IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 70 OF 2007

Datta Daku Naik,
resident of H.No. 499, Digas,
Panchwadi, (since deceased),
represented by his legal heirs,

(a) Prakash Datta Naik
Power of Attorney Holder
of Appellant No. (b) to (g)

(b) Deepak Datta Naik
(c) Amar Datta Naik
(d) Viraj Datta Naik
(e) Prasad Datta Naik
(f) Neelam Datta Naik
(g) Sudhir Datta Naik
All r/o. Digas Panchawadi, Goa. .... Appellants

V/s.

Purushottam Dattaram Sinai Gude,
resident of Digas, Panchwadi
(since deceased) represented
by his legal heirs,

(a) Prakash P. Gude
(b) Uday P. Gude
(c) Usha Uday Gude
(d) Ulhas P. Gude
(e) Naresh P. Gude
(f) Vivek P. Gude
Power of attorney holder
of Respondent No. (a) to (h)
(g) Abhay P. Gude
(h) Daksha Uday Gude
(i) Kalpana Vivek Gude
(j) Sumedha Devidas Mahatama
(k) Sagar Devidas Mahatama
(l) Sweta Devidas Mahatama
All residents of Khorlim,
Mapusa, Goa.

(m) Smita Ravindra Nadkarni
(n) Ravindra Nadkarni
Both residents of Kakoda,
Curchorem, Goa.

(o) Neeta Arun Kulkarni
(p) Arun S. Kulkarni
both residents of near
S.T. Bus Stand, Sawantwadi,
Sindhudurg, Maharashtra. .... Respondents

Mr. Sudin M.S. Usgaonkar, Advocate for the Appellants.

CORAM : N.A. BRITTO, J.

DATE : 24th SEPTEMBER, 2007

ORAL ORDER :

Heard Shri Usgaonkar, the learned Counsel on behalf of the plaintiff. This is plaintiff's Second Appeal.

2. Apparently, during the course of the trial, the plaintiff as well as the defendant expired. They are now being represented by their respective legal representatives.

3. The Plaintiff filed the suit for injunction simpliciter against the Defendant in respect of the property known as "MADDA ZUVEM". This property is admittedly surveyed under sub-division 3 and 4 of survey no. 237. It also has Land Registration bearing No. 2496 of Book B of new series. The

Defendant resisted the suit by restricting his claim to the portion under sub-division 3 of survey no. 237. The Defendant took the plea that he was in possession of the said portion and alternatively claimed ownership of the same by adverse possession. The Defendant did not specify as to from when he was possessing the property adversely. The Defendant did not produce any document.

4. Plaintiff produced several documents. Both the parties led oral evidence. Both the Courts below have come to the conclusion that it is the Plaintiff who is in possession of the disputed portion i.e. sub-division 3 of survey no. 237 of the property Madda Zuvem. There is also no dispute that the said property apart from being registered in the land registration office in the name of the Plaintiff. It is also recorded in the name of the Plaintiff in the survey records. There is also no dispute that the Defendant has his house in the said portion of sub-division 3 of survey no. 237. The suit of the Plaintiff might have not been a suit for declaration but nothing prevented the Plaintiff to produce the documents which would fortify the claim not only as regards title but also possession. Form no. 1 and 14 certainly carries a presumption that it is the Plaintiff who was in possession of both the sub-divisions. The said presumption was certainly rebuttable but the type of evidence the defence led, it could not be said that the Defendant had rebutted the said presumption. The defence witnesses did not restrict the claim of Defendant's possession

only to sub-division 3 of survey no. 237 but gave their evidence as if the entire property was in possession of the defendant, when that was not the case of the Defendant himself. The Plaintiff also produced another formidable document namely an order of Mamlatdar dated 2/01/1981 by which the Defendant's claim for Mundkarship was rejected by the Mamlatdar. The records do not show as to when the Defendant had made the said claim but filing an application for declaration that the Defendant was a Mundkar of the Plaintiff was nothing short of an admission acknowledging that the Plaintiff was the owner in possession of the suit property.

5. Upon assessment of the evidence led by both the parties, the Courts below, have come to the conclusion that the Defendant is not in possession of the disputed portion This is a concurrent finding of fact. It is not the case of the Defendant that the said concurrent findings are based on no evidence.

6. In my view, there is no substantial question of law involved in this Second Appeal, much less in the manner formulated on behalf of the Plaintiff.

7. Second Appeal therefore is rejected in limine.

N.A. BRITTO, J.

NH/-